91-16

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1991

KATHLEEN ANN STEWART,
Petitioner,

v.

FORT WAYNE COMMUNITY SCHOOLS,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

John S. Bloom
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QUESTIONS PRESENTED

Does the deprivation of a protected property interest by an administrative body result in a violation of substantive due process when the substantive standards on which the administrative body relies are based on a rescinded policy?

a. Does a schol psychometrist have a legitimate claim of entitlement to, and thus a constitutionally protected property interest in, her job when she has achieved "tenured" status under state law?

b. When a school board replaces a specific reduction-in-force policy (requiring dual-certification of administrative personnel) with a new policy (requiring a general review of qualifications), does the school board's subsequent use of the rescinded policy in discharging the petitioner fail the "reasonably ascertainable standards" test?

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INTRODUCTORY PRAYER

The Supreme Court of Indiana acknowledged that in 1983, Fort Wayne Community Schools (hereinafter "School") rescinded its 1981 retrenchment policy which favored psychometrists who were also certified as counselors. The Indiana Supreme Court rejected the petitioner's due process claim under Section 1983 of Title 42 despite the fact that the

petitioner, who had "tenure" status under state law, was later terminated pursuant to a written decision of the school board which set forth in length the rescinded policy and was explicitly based on the petitioner's lack of a counselor's certification. The Supreme Court of Indiana denied the petitioner's Petition for Rehearing on March 21, 1991. The petitioner, Kathleen Ann Stewart, prays that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the court below.

CITATIONS TO OPINIONS BELOW

Stewart v. Fort Wayne Community Schools, 545 N.E.2d 7 (Ind. App. 1989).

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on December 27, 1990, reversing the decision of the Indiana Court of Appeals for the Third District and affirming the decision of the trial court and ultimately the school board's

decision to terminate the petitioner, Kathleen Ann Stewart (hereinafter, "Stewart"). The Supreme Court of Indiana denied a timely Petition for Rehearing on March 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS

1. United States Constitution, Amendment 14, Section 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

2. 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

3. 42 U.S.C. § 1988: " . . . In any action or proceeding to enforce a provision of [42 U.S.C. § 1983] . . ., the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost."

STATEMENT OF THE CASE

Facts Material to Questions Presented.

On February 18, 1983, Stewart received notice that the school board would be considering the cancellation of her contract at a school board meeting on March 28, 1983 (R.30). The school board held a hearing at Stewart's request and, on March 28, 1983, terminated Stewart pursuant to its written Findings and Conclusions (R.30-37). The parties stipulated that Stewart had permanent or

"tenure" status under Indiana's teacher tenure statute (R.12).

It is clear from the board's findings that Stewart was terminated pursuant to the board's rescinded 1981 "dual certification" policy. On November 23, 1981, the school board had adopted a policy to reduce the number of administrative positions (R.34-35). At the core of the 1981 policy was the requirement of dual certification whereby psychometrists were required to have or obtain certification in the field of counseling in addition to psychometry (R.34-35).

During the school year 1981-82, after the implementation of the 1981 dual certification policy and prior to its rescission, Stewart notified the school of her desire to obtain a counselor's license (R.170) and she was actively pursuing the licensing requirements by taking

coursework required therefor. (R36 & 168). Although Stewart did not complete the licensing requirements, the dual certification requirement had been rescinded by the school board prior to Stewart's termination on March 28, 1983.

According to the minutes of a board meeting dated January 24, 1983, the board adopted new administrative reduction guidelines which were "to replace those adopted on November 23, 1981" (R.270). The new guidelines contain no dual certification requirement (R.270).

Nevertheless, in its written Findings and Conclusions, the school board specifically followed the 1981 dual certification policy as the rationale for Stewart's termination. The findings set forth the 1981 policy in length and Stewart's termination was explicitly based on her lack of additional certification (R.33-4, 37). The school board's Findings

and Conclusions are devoid of any reference to the new 1983 policy which required a fair and equitable review of the qualifications of the individual administrators (R.270).

The school board retained two non-tenured psychometrists despite the fact that neither had counselor certification. The dual certification policy permitted non-certified persons to "act" as psychometrist/counselor despite state regulations requiring proper certification. Although both of the retained, non-tenured psychometrists had teacher's certificates, that is only one requirement of counselor certification. One of the retained non-tenured psychometrists was only assigned psychometrist duties (i.e, testing).

How the Federal Question Was Presented.

Although Stewart's original complaint was not included in the transcript of the

record, the trial court's Findings of Fact show at paragraph 15 that "Plaintiff's complaint against Defendant (as alleged in her complaint) is that her constitutional rights were violated pursuant to 42 U.S.C. § 1983 and that the actions of the School Board were arbitrary and capricious" (R. 22). The trial court disagreed (R. 23) and Stewart appealed to the Court of Appeals for the Third District of Indiana arguing that the school board's decision was based on a rescinded policy and was, thus arbitrary and capricious (Brief, part VI of Argument) and that such action supported a claim under 42 U.S.C. Section 1983 (Brief, part VII of Argument). The Court of appeals agreed and held that "FWCS has deprived Stewart of a property interest secured by the due process clause of the Fourteenth Amendment. This deprivation entitles her to damages and equitable relief pursuant to Section 1983

and to attorneys fees under Section 1988" (Opinion, p. 11). In opposition to the School's Petition to Transfer to the Supreme Court of Indiana, Stewart again argued that "the school board and trial court based their decisions upon the rescinded policy of 1981" (Brief, p.5), thus rendering the decision arbitrary and triggering 42 U.S.C. § 1983 (Brief, p.8). The Supreme Court of Indiana passed upon the issue finding no due process deprivation.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Indiana closed its eyes both to Stewart's state law claims and to her claim of protection under the federal constitution. While Stewart has fully exhausted her state law claims, this case presents broad issues of great importance at the federal level; namely, the clarification of the scope of the due process clause of the Fourteenth

Amendment as it relates to administrative decision-making. This case also presents a compelling opportunity to prevent a manifest injustice to the petitioner, Kathleen Ann Stewart.

Since the school board acted under color of state law, Section 1983 of Title 42 gives Stewart a cause of action against the school board if the board's action deprived Stewart of "any rights, privileges, or immunities secured by the Constitution . . ." 42 U.S.C. § 1983 (1988). The school board's action in terminating Stewart's employment based on a rescinded policy violated Stewart's right to substantive due process under the 14th Amendment of the federal Constitution.

The due process clause of the 14th Amendment protects Stewart from the deprivation of a protected property interest for arbitrary reasons. Thus, the

initial question is whether Stewart had a property interest in her job that is protected by the 14th Amendment.

The Supreme Court of Indiana acknowledged that Stewart had the type of interest in her job which lies within the scope of the 14th Amendment's protection of "life, liberty, and property." This conclusion is compelled by this Court's decision in Board of Regents v. Roth, wherein the Supreme Court said:

> To have a property interest in a benefit [such as a job] a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Board of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561, 92 S. Ct. 2701 (1972). In Roth, this Court held that a state university teacher's interest in continued employment did not merit

constitutional protection where the teacher had no claim of entitlement under contract or state law. Id. However, this Court has held that even in the absence of a formal contract or formal tenure scheme, a protected property interest in a job may be created by an implied promise of continued employment (Connell v. Higginbotham, 403 U.S. 207, 208, 29 L.Ed.2d 418, 420, 421, 91 S.Ct. 1772 (1971)) or by a defacto tenure policy (Perry v. Sinderman, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972)).

In this case, the parties stipulated that Stewart had permanent or "tenure" status under the Indiana teacher tenure statute. Her expectation of and reliance upon continued employment was clearly more than abstract or unilateral. Rather, she had a legitimate claim of entitlement under state law. Therefore, the school board could not deprive Stewart of her job

in a manner inconsistent with the requirements of due process.

The most basic substantive requirement of due process is the prohibition against arbitrary decision-making. In order to promote fair, orderly, and consistent decision-making, governmental decisions which affect constitutionally protected interests of individuals are required to be in accord with previously stated, reasonably ascertainable standards. Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967).

In the present case, the findings of the school board go to great length to show the economic necessity of the reduction in force. There is no question that the School could reduce its administrative staff for economic reasons. However, in determining who should bear

the harsh consequences of the economic reality, the board had to base its decision on previously stated, reasonably ascertainable standards, where its decision would affect constitutionally protected interest. Implicit in the ascertainable standards requirement is the notion that the agency must follow the standards in effect and must not arbitrarily base its decision on a rescinded policy. It could hardly be more clear in the instant case that the board base its decision on the "dual certification" policy adopted in 1981 and rescinded in January of 1983.

Stewart had a right to assume that, in reaching its decision, the board would make a general evaluation of her qualifications rather than punish her for failing to meet the requirements of a rescinded policy. Indeed, this is one of the rationale for the "reasonably

ascertainable standards" requirement: so that the individual does not have to guess as to what the agency will consider in making its decision.

It is true that this Court has held that an agency's violation of its own regulations is not per se unconstitutional unless the regulations themselves are necessary to afford due process. United States v. Caceres, 440 U.S. 741, 59 L.Ed.2d 733, 99 S.Ct. 1465 (1979); see also, Arzanipour v. Immigration and Naturalization Service, 866 F.2d 743 (5th Cir. 1989); Bowens v. N. C. Department of Human Resources, 710 F.2d 1015, 1019 (4th Cir. 1983); and Woodard v. Las Fresnos Independent School District, 732 F.2d 1243, 1245 (5th Cir. 1984). However, all of the cases following this rule have dealt with an agency's failure to comply with its own procedural requirements. Where the agency failed to comply with its

own substantive standard, courts have found that the requirements of due process were not met. E.g., Marshall v. Lansing, 839 F.2d 933, 943 (3rd Cir. 1988). The requirement that agencies follow its own substantive standards goes to the core of the "reasonably ascertainable standards" test and the due process protection against arbitrariness. In the present case, the board had expressly replaced the dual certification policy of 1981 with a new policy which had no dual certification requirement. In reaching its decision, the board ignored its own substantive standard and relied instead upon the rescinded policy. The decision must therefore be characterized as arbitrary and Stewart is entitled to relief under Sections 1983 and 1988 of Title 42.

CONCLUSION

For all the foregoing reasons, the Supreme Court of the United States should

grant Stewart's Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Indiana.

BLOOM & BLOOM
PROFESSIONAL CORPORATION

BY: _____
John S. Bloom
Indiana Supreme Court
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FINDINGS AND CONCLUSIONS OF SCHOOL BOARD

1. Kathy Stewart is employed by the Fort Wayne Community Schools as a Psychometrist under written contract (Board Exhibit 1). She was first employed under regular contact by the Fort Wayne Community Schools on January 30, 1978, and has been employed on annual contracts since August of 1978.

2. By letter dated February 18, 1983, (Board Exhibit 2), she was notified that on March 28, 1983, the Board of School Trustees would consider the Superintendent's recommendation that her contract be cancelled, an action "taken to decrease the number of administrative positions (Board Exhibit 2)." The letter informed her of the time and place of the consideration of the recommendation, and her right to hearing if requested in

writing. The letter further stated:

"Due to various existing conditions which include the uncertainty of both federal and state funding as well as the continued decline in student enrollment, it is necessary to reduce the number of administrators employed by the Fort Wayne Community Schools for the 1983-84 year. Since the district is moving toward dual certification, (i.e., Psychometrist/Counselor) and the counseling certificate requires a teaching license, it follows logically that any reduction in numbers would first include those not licensed as teachers. You have least seniority among those persons licensed as Psychometrists who are not licensed as teachers and therefore, you will not be employed as a Psychometrist for the 1983-84 school year. Since there is no other available position for which you are certified, it is necessary to cancel your contract with the school corporation."

3. On March 4, 1983, Mrs. Stewart's attorney wrote to the Fort Wayne Community Schools and requested a hearing (Board Exhibit 3), which was set for March 14, 1983 (Board Exhibit 4). Mrs. Stewart's attorney's March 4 letter requested a statement of reasons for the consideration of cancellation, and the response sent

three days later (Board Exhibit 4) identified the reasons as described in Board Exhibit 2, copy of which was enclosed with Board Exhibit 4.

4. On March 8, 1983, Mrs. Stewart's attorney again wrote to the Fort Wayne Community Schools requesting a public hearing (Board Exhibit 5), a statement of reasons for the proposed cancelation in the language of the statute, a copy of the rules of procedure governing the hearing, inquiring as to provisions for subpoenaing witnesses and documents, and requesting review of the personnel records of all Psychometrists together with other documents.

5. By letter dated March 10, 1983, (Board Exhibit 6), the Fort Wayne Community Schools responded through its attorney that the hearing would be public, that the reasons for the cancellation

stated in the letter of February 18, 1983, (Board Exhibit 2) were more specific than the statutory phrase of decrease in the number of teaching positions, that there were no written rules of procedure governing conduct at the hearing but that it would be run similar to a trial with an independent attorney employed by the Board to preside and rule on evidentiary matters, that there was no provision for the subpoenaing of witnesses but that the school system would do what it could to have those over whom it had control in attendance if a list was provided by Mrs. Stewart, and verifying that a number of documents had been provided to Mrs. Stewart's attorney, but that the personnel files of other Psychometrists were confidential to them and a waiver from them or a valid court order would be needed prior to their release. The letter

also requested copies of all documents which Mrs. Stewart intended to produce as evidence.

6. By letter dated March 14 and received by the Fort Wayne Community Schools' attorney at approximately 2:00 o'clock p.m. on the same day of the hearing, Kathy Stewart's attorney contended that the collective bargaining agreement entered into, with classroom teachers applied to Mrs. Stewart, and requested the Superintendent's conference described in that collective bargaining agreement. In addition, Mrs. Stewart's attorney requested the review of certain materials on other school Psychometrists. By telephone, the school attorney responded that Kathy Stewart was not a member of the bargaining unit and that therefore the contract didn't apply, but that the requested documents would be made

available at approximately 4:30 p.m. the day of the hearing. They were made available and reviewed by Mrs. Stewart's attorney.

7. Shortly before 5:30 p.m., a hearing was commenced in the Board room of the Fort Wayne Community Schools administration building, 1230 South Clinton Street, Fort Wayne, Indiana. Present and representing the School administration and presenting evidence on the contract cancellation were William L. Sweet, Jr., attorney, Superintendent Bill C. Anthis, and Deputy Superintendent James K. Robbins. Present and representing Kathy Stewart were Attorney David Keller and Mrs. Stewart. The hearing was presided over by Attorney Vern Sheldon who was independently employed by the Board to preside and rule on evidentiary matters.

8. Superintendent Anthis testified

that he became Superintendent of the Forth Wayne Community schools on July 1, 1980, but prior to that he had been the Assistant Superintendent for Instruction at FWCS for nine years. Student enrollment in the Fort Wayne Community Schools began declining from a peak of approximately 43,000 in the early 1970's to approximately 33,000 students now, an average decline of approximately 1,000 per year. During the 1982-83 school year, the decline in student enrollment was just under 1,000 students, and the school administration projects a similar decline for the 1983-84 school year, although it could be greater given current economic conditions in the Fort Wayne metropolitan area which might cause a loss in general population levels as people move elsewhere seeking employment.

9. Beginning in the mid-1970's, due

to the decline in enrollment, FWCS began cutting back its administrative staff. In determining which positions to eliminate, FWCS chose to eliminate specialists with limited duties in favor of those who could fulfill multiple functions, and began by eliminating full-time consultants and full-time supervising teachers. That process has continued over the years.

10. Decisions to reduce administrative staff for both the 1982-83 and the 1983-84 school years are based generally on the following three factors:

a. The continuing decline in student enrollment results in declining state financial aid. The majority of state funding for FWCS is determined by a per capita formula based on student enrollment, so that fewer students result in less state funding. The reduction in enrollment of just under 1,000 students from the 1981-82 school year to the 1982-83 school year reduced that funding, as will the similar enrollment decline projected for 1983-84.

b. Since local property tax revenues were frozen by the state

legislature in 1973, increases in state funding have not kept pace with rising expenses. Local school districts cannot increase local revenues and are dependent on the state for increase funds. The rising costs associated with operating a school system have increased at a faster rate than the increase in state funds.

c. In the past three to four years, federal funding has been significantly reduced. For example, FWCS received an ESAS grant from the federal government at a level of approximately $460,000 four years ago. Today, FWCS receives nothing for those same programs, yet some of the programs continue and are paid for by the general fund. There have been similar reductions in other federal grants.

11. As a result of these revenue related factors, the FWCS administrative staff was reduced by 16 positions in school year 1981-82, 12 positions in school year 1982-83, and a reduction of 10 positions is anticipated in school year 1983-84.

12. With the knowledge that administrative staff needed to be reduced, Superintendent Anthis met, in the Spring of 1981, with all FWCS administrative

employees who had less than five years service with FWCS under a regular contract. The need for administrative reductions was discussed and the administrators present were told that it was important for them to obtain licensing and certification in multiple areas so that they could be used in various combined positions in the future. Those with single certifications who could only occupy one position were told that they would be the most likely to have their jobs eliminated as staff reductions occurred. Kathy Stewart was present at the meeting and had only a single certification, that of school Psychometrist.

13. On November 23, 1981, the FWCS Board of School Trustees approved an administration recommendation regarding the reduction of administrative staff

involving the elimination of the Guidance Counselor and Psychometrist positions (Board Exhibit 7 and Exhibit F), and the combining of those positions into Dean/Counselor and Psychometrist/Counselor positions. Dr. Anthis testified that the reasons that the administration recommended elimination of the Psychometrist position were as follows:

a. Although testing is required by the Department of Public Instruction and the North Central Association (a group involved in accreditation of school systems), actual employment of Psychometrists is not. Licensed Counselors, on the other hand, are required at a ratio of one licensed Counselor to 450 students by North Central, and one licensed Counselor to 400 students by the State of Indiana. Since particular schools seldom have exactly 400 to 450 students, persons fulfilling multiple rolls could satisfy counseling requirements by North Central and the Department of Public Instruction and still do testing with a psychometric license at other times or during the summer. The combination of these responsibilities allows fewer overall administrative personnel to perform required functions while still meeting all requirements of North Central and the Department of Public

Instruction. For example, a middle school of 600 students would require approximately one and one-half Counselors. A duly certified Psychometrist/Counselor could provide the half-time counseling without over-staffing and still do psychometric testing. The figure of 600 students is closer to the typical middle school size than 400 students.

b. The return of administrative personnel, in this case Psychometrists, to the school building level is consistent with the administration and School Board's goal to put scarce educational dollars with the students rather than on a system-wide administrative position having no direct impact on or contact with students.

14. The procedure approved by the School Board on November 23, 1981, to accomplish the elimination of the Psychometrist position included the following:

1. The position of guidance Counselor will be upgraded to Dean/Counselor and Psychometrist/Counselor. This is related to declining pupil enrollments and limited school finances. It follows the pattern already established in central office positions where two or three functions have been combined under one position with the title reflecting duties and responsibilities in a combination of

areas.

2. Psychometrists and guidance Counselors will be assigned to the positions of Psychometrist/Counselor.

3. The Superintendent met on November 3, 1981, with guidance Counselors and Psychometrists to inform them of the circumstances surrounding the changes and the proposed administrative titles and duties affecting them.

4. Assignment of guidance Counselors and Psychometrists to vacancies in the administrative ranks will be made on the basis of qualifications to fill the openings which are available. Any factors, including seniority, will be considered in making these selections.

5. The Psychometrist/Counselor position will require certification as a Psychometrist and guidance Counselor.

. . . .

8. In some situations it may be necessary to give a guidance Counselor or Psychometrist a period of time to fully meet the certification requirements of the position to which he/she is assigned.

9. Interviews with present guidance Counselors and Psychometrists requesting consideration for assignment to the Psychometrist/Counselor and Dean/Counselor positions will be completed before January 11, 1982. The Superintendent has appointed an interview committee for this purpose.

15. Prior to the Board's approval of

the elimination of the Psychometrist positions, all Psychometrists had been asked to indicate their assignment preference if the positions were eliminated. Kathy Stewart testified that she received the assignment preference form in the Spring of 1981 at the meeting with Superintendent Anthis. When she returned the form in November of 1981, she put a question mark in the box indicating a preference for interviewing for the Psychometrist/Counselor position (Board Exhibit 8).

16. Following the procedure approved by the Board in November of 1981, Kathy Stewart was interviewed by a committee chaired by Dr. James Robbins. At the time of the interview, Dr. Robbins testified that she indicated a lack of interest in position at the building level. Kathy Stewart's own notes of the interview

(Exhibit E) and her later letter to Dr. Anthis (Exhibit B) both verify that at the time of the interview she refused to make any commitment that she would work toward a counseling certification.

17. Following the interview process, which involved all Psychometrists and all guidance Counselors, the interview committee recommended that Kathy Stewart not be given one of the combined positions, and that she therefore be laid off. That recommendation was based on three factors:

a. Kathy Stewart had only a single license, in psychometry, and a teacher's license at a minimum was a prerequisite to obtaining counseling license (see Exhibit A).

b. Kathy Stewart had indicated a lack of interest in obtaining counseling certification and in working in school buildings rather than central administration.

c. Kathy Stewart and one other Psychometrist were the least senior in terms of length of service with the Fort

Wayne Community Schools of the singly licensed Psychometrists, and that both she and the other least senior Psychometrist should be laid off.

18. On March 22, 1982, the School Board laid off seven administrative personnel, five guidance Counselors, and the two least senior singly certified Psychometrists (Board Exhibit 9). Kathy Stewart was one of the two least senior persons certified only as Psychometrists who was laid off.

19. Kathy Stewart was reemployed for the 1982-83 school year upon the recommendation of the Fort Wayne Community School's attorneys that proper contract cancellation procedures of state law had not been followed in her layoff. During the 1982-83 school year, she was the only singly certified Psychometrist employed by the Fort Wayne Community Schools under regular contract. All other

administrative employees who formerly worked as Psychometrists are employed at the present time as Psychometrist/Counselors if they had a counseling license, or as acting Psychometrist/Counselors if they had only a teacher's license while they work toward a counseling certificate in accordance with the program approved by the School Board on November 23, 1981 (Board Exhibit 7).

20. Although Kathy Stewart has, since her layoff in March of 1982, been working toward a teacher's license, one of the prerequisites to a counseling license (see Exhibit A), she still has over 30 hours of studies to complete to obtain a teacher's certificate. She is the least senior in terms of service with the Fort Wayne Community Schools under regular contract of all Psychometrists holding

only a single certification (Board Exhibits 10 and 11).

21. Under North Central Association guidelines, licensed teachers are permitted to do counseling work.

22. There is a justifiable need to decrease the number of administrative positions and to eliminate the position of Psychometrist.

23. Neither North Central nor the Department of Public Instruction require any particular staffing levels for Psychometrists. Although Rule S-1 (Exhibit G) issued by the Commission on General Education of the Indiana State Board of Education requires testing of special education students, no permanent employment of full-time Psychometrists in mandated. Therefore, the job of Psychometrist may be eliminated without violating any rule or regulation of this

State or any accreditation requirements of North Central.

24. Kathy Stewart was not given a Psychometrist/Counselor position for the 1982-83 school year based upon her lack of teacher's or Counselor's certification, her position as the least senior in length of service of those with only a Psychometrist certificate, and her lack of interest in and refusal to commit to obtain counseling certification.

25. There are currently no job openings for Psychometrist/Counselors. Kathy Stewart has the least service under regular contract of all certified Psychometrists who have no other certification. There is no other administrative position which she is qualified or certified to perform.

26. Kathy Stewart is not within any bargaining unit for which a collective

bargaining unit exists under Public Law 217. The only collective bargaining agreement in effect under Public Law 217 with the Fort Wayne Community Schools is that with the Fort Wayne Education Association, which covers only class-room teachers.

CONCLUSIONS

1. The Superintendent's recommendation to cancel the contract of Kathy Stewart should be accepted for the following reasons:

a. There is a justifiable need to reduce the number of administrative positions.

b. The administrative position of Psychometrist should and can be eliminated and psychometric testing done on a part-time basis by those so certified who also perform other duties.

c. Kathy Stewart is neither licensed nor certified to perform any duties other than those of a Psychometrist, and has less service with this school corporation than any other person similarly situated.

2. The contract of Kathy Stewart is hereby cancelled, effective after June 17, 1983, the end of the school term following this cancellation.

THE BOARD OF SCHOOL
TRUSTEES OF THE FORT
WAYNE COMMUNITY SCHOOLS

FINDINGS AND CONCLUSIONS OF TRIAL COURT

The Court having taken under advisement the evidence presented at trial on May 24, 1988, and based upon all pleadings, exhibits and depositions heretofore filed, now makes findings of facts and conclusions thereon as follows:

FINDINGS OF FACT

1. The contract of Plaintiff, Kathleen Ann Stewart, with Fort Wayne Community Schools was cancelled effective June 17, 1983, by the Board of School Trustees of the Fort Wayne Community Schools pursuant to Findings and

Conclusions date March 28, 1983.

2. The School Board's decision to cancel the contract of Plaintiff was made after the Superintendent of Schools so recommended and a hearing was held in which evidence was taken concerning the cancellation. As Plaintiff's attorney admitted in oral argument, Plaintiff does not complain about compliance with statutory procedures insofar as matters leading up to the hearing, the hearing itself or the Board's decision.

3. The Fort Wayne Community Schools experienced:

a. significant declines in student enrollments in the 1970's and early 1980's;

b. a State freeze on local property tax revenues in light of the rising costs associated with operating the school system; and

c. a reduction of federal funding;

necessitating the decision to eliminate

12-15 administrators prior to the opening of the 1982-83 school year.

4. Student enrollments in Fort Wayne Community Schools declined by approximately 1000 students per year between 1972 and 1983 and a decline in enrollment was projected into the 1983-84 school year when the decision was made to lay off and consolidate administrative personnel.

5. The reduction in administrative personnel resulted in the elimination of five Counselors and two Psychometrists by the 1983-84 school year. Additionally, seven Psychometrists resigned pursuant to an early retirement incentive offered by Fort Wayne Community Schools to induce a further reduction in administrative personnel.

6. Fort Wayne Community Schools is accredited by the North Central

Accrediting association and must meet accrediting requirements imposed by either North Central or the State of Indiana.

7. The position of Psychometrist is not currently required and was not required in 1981 by either the North Central Accrediting Association or the State of Indiana.

8. In November of 1981, due to continuing enrollment declines, the Fort Wayne Community Schools Board of School Trustees adopted the decision to eliminate the Psychometrist and Counselor positions and create the dual position of Psychometrist/Counselor, which required certification as both a Psychometrist and a Counselor.

9. In the spring of 1981, the Superintendent of Schools met with those Psychometrists and Counselors with less than five (5) years under contract with

the Fort Wayne Community Schools to discuss administrative reductions. Plaintiff was present at that meeting, and was told that it would be important to obtain multiple licenses because of the need to reduce personnel and the fact that positions were going to be combined. She was aware of the administrative reductions, the fact that Psychometrists would be among those affected, and that she would be more likely to be able to retain her position by obtaining additional licensing.

10. A classroom teacher's license and teaching experience are prerequisites to certification as a Counselor.

11. Plaintiff did not have a general teacher's license (which is a prerequisite for certification as a Counselor) when her contract was cancelled in 1983 nor was she working toward obtaining such a license.

12. Plaintiff was the only Psychometrist employed in the 1982-83 school year and nobody else has been hired (after Stewart's contract was cancelled at the end of the 1983 school year) for the position of Psychometrist.

13. All others retained over Stewart were more qualified for the Psychometrist/Counselor position than Stewart because all had Psychometrist certification, as did Stewart, but all also had classroom teaching licenses, which is a prerequisite to Counselor certification. Additionally she was the least senior.

14. Plaintiff has stipulated that she was terminated pursuant to the provisions set forth in IND. CODE §20-6.1-4-10 and that all of her procedural due process rights as required by statute and by law were honored.

15. Plaintiff's complaint against Defendant (as alleged in her complaint) is that her constitutional rights were violated pursuant to 42 U.S.C. §1983 and that the actions of the School Board were arbitrary and capricious.

16. Plaintiff has presented no evidence that the actions taken by Defendant were the product of a bad motive on the part of said Defendant.

CONCLUSIONS OF LAW

1) A School Board has authority to define, redefine and reclassify job classifications affecting both tenured and nontenured personnel.

2) All statutory procedures regarding the cancellation of an indefinite teacher's contract, as set forth in IND. CODE §20-6.1-4-10, were followed by the Fort Wayne Community Schools regarding the contract of the

Plaintiff.

3) The cases of Watson v. Burnell, 23 N.E.2d 420 (Ind. 1939) and Barnes v. Mendenhall, 1983 N.E.2d 556 (Ind. App. 1932) are inapplicable to the facts presented as the Plaintiff was less qualified for the Psychometrist/Counsel position than anyone else retained in the position.

4) The Plaintiff has stipulated and this Court finds that Defendant has not violated any procedural due process rights.

5) That the only substantive due process claims which are recognized by the courts are:

a) the substantive due process right of a woman to decide whether to have an abortion Roe v. Wade, 410 U.S. 113 (1973)

b) governmental conduct that is arbitrary or capricious

c) government use of excessive

force. Rochin v. California, 342 U.S. 165 (1952). Johnson v. Glick, 481 F.2d 102 (2nd Cir. 1973).

6) That the appropriate time to be reviewed by this Court in making determination as to the appropriateness of the Board's action is the circumstances at the time of the Board's hearing.

7) That no claim has been submitted or advanced in this lawsuit which would support a claim based on a violation of substantive due process.

8) That 511 IAC 6-2-1 et seq. imposes no specific duty on the School Board to Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Judgment be entered in favor of Defendant and against Plaintiff, costs to Plaintiff.

Dated this 4th day of November, 1988.

EDWARD J. MYERS
JUDGE, WHITLEY CIRCUIT COURT

COURT OF APPEALS OF INDIANA THIRD DISTRICT
APPEAL FROM THE WHITLEY CIRCUIT COURT

STATON, J.

Kathleen Ann Stewart appeals the cancellation of her contract with Fort Wayne Community Schools (FWCS). The decision of the FWCS Board to cancel her contract was reviewed and upheld by the Whitley Circuit Court. Stewart also appeals denial by the trail court of her claim for reinstatement, damages, and attorney fees under 42 U.S.C. Sections 1983 and 1988.

Stewart presents us with several issues on appeal, consolidated and restated these are:

1. Whether the board was required to retain Stewart over other non-tenured employees?

2. Whether the board action was arbitrary, capricious, and contrary to law?

3. Whether Stewart was denied substantive due process?

4. Whether Stewart has a claim under 42. U.S.C. section 1983 and 1988?

Reversed.

Stewart was first employed by FWCS as a psychometrist in January, 1978. Thereafter, she was employed on annual contracts for six consecutive years. Pursuant to a pretrial order of the Whitley Circuit Court, the parties stipulated that Stewart was a "tenured" teacher,[1] that she was terminated pursuant to the provisions of IC 20-6.1-4-10,[2] and that two non-tenured employees were retained at the time of the cancellation of Stewart's contract.

On appeal we will review the administrative proceedings to determine whether the board decision was supported by substantial evidence, was not arbitrary

and capricious, and whether the board followed all relevant rules of law and procedure, including its own rules. Metropolitan School District of Martinsville v. Mason (1983), Ind. App., 451 N.E.2d 349, 353, trans. denied.

I.

Cancellation

On February 18, 1983, Stewart was notified that cancellation of her contract would be considered at a school board meeting on March 28, 1983. The reasons given for cancellation of her contract were: declining student enrollment; uncertainty of funding; her lack of dual certification; and seniority. Stewart requested a hearing before the board which was held on March 14, 1983. On March 28, 1983, the board cancelled her contract effective after June 17, 1983.

It is apparent from the findings of

the board that Stewart's contract was cancelled pursuant to an administrative reduction policy adopted by the board on November 23, 1981. The policy provided for the elimination of the guidance counselor and psychometrist positions and the creation of new, combined, positions for "dean/counselor" and "psychometrist/counselor". The procedural guidelines for implementation of this dual certification policy included the allowance of time for guidance counselors and psychometrists to meet the certification requirements of the new dual position.[3]

Stewart contends that in January of 1983 a new policy for administrative reduction was adopted replacing the dual certification policy. The record supports this claim. According to the minutes of a board meeting held on January 24, 1983,

the new administrative reduction guidelines were "to replace those adopted by the Board on November 23, 1981." R. 270 (emphasis added). The 1983 guidelines made no mention of a dual certification requirement. The 1983 guidelines state in pertinent part that:

> Administrators will be selected for reduction in force in a manner that is fair and equitable after the qualifications of the individuals potentially involved have been reviewed.

R. 270. It is clear from our review of the record that both the board and the trial court based their findings on the rescinded administrative reduction policy of 1981.

One of the factors we consider in reviewing a school board decision is whether the board followed its own rules. Mason at 451 N.E.2d 353. In this case it did not. We must now determine if Stewart was prejudiced by this failure.

The guidelines in effect at the time Stewart's contract was cancelled state that reduction would be in a fair and equitable manner "after the qualifications of the individuals potentially involved have been reviewed." R. 270. At the time Stewart's contract was cancelled her position was classified as "psychometrist". Board finding number 14 states in pertinent part that:

14. The procedure approved by the School Board on November 23, 1981, to accomplish the elimination of the psychometrist position included the following:

* * * *

2. Psychometrists . . . will be assigned to the positions of psychometrist/counselor.

* * * *

5. The psychometrist/counselor position will require certification as a psychometrist and guidance counselor.

* * * *

8. In some situations it may be necessary to give a guidance counselor or

psychometrist a period of time to fully meet the certification requirements of the position to which he/she is assigned.

R. 34 (emphasis added).

At the time Stewart's contract was cancelled two non-tenured employees were retained in the psychometrist/counselor position who were not certified counselors. The school board contends that they were more qualified than Stewart because they had classroom teacher's licenses. However, a classroom teacher's license is only one of several prerequisites for a counseling license. 530 IAC 2-1-11 (in effect at the time Stewart's contract was cancelled).[4] At the time of the school board action, title 510 article 12 of the Indiana Administrative Code governed licensing requirements for Pupil Personnel Services.[5] Rule 2 of that article stated that "[a]ll personnel providing pupil

personnel service shall be properly certified in their service area." 510 IAC 12-2-1(A) (emphasis added); see also Switzerland County school Corporation v. Sartori(1982), Ind. App., 442 N.E. 2d 702, 704, reh. denied, rans. denied, (discusses importance of teacher licensing). During the hearing conducted by the trial court this rule was explained by Denny C. Skeens, Director of Accreditation and Facility Planning for the State Department of Education. He testified that the function of the Accreditation division was evaluate schools to determine whether they were complying with the "requirements of the State Board of Education and state statute." R. 345. Skeens testified that the FWCS policy of allowing personnel without a counselor's license to serve in the position of "psychometrist/counselor" (including the "acting" category) was "in

violation of state rules". R. 349. We agree.

The language of rule 2 clearly stated that personnel "shall be properly certified". Nevertheless, the school board retained non-tenured employees who, like Stewart, were licensed only in psychometry, in the psychometrist/counselor position.[6] The school board cannot presume to create new licensing requirements for teachers; this responsibility has been delegated by the legislature to the State Board of Education. Currently at IC 20-1-1-6 (Burns Code Ed., 1988 Supp.).[7] FWCS has exceeded its authority and acted contrary to law.

II.

Tenure Rights

Stewart also contends that the school board action was contrary to law because

she had tenure while the other two employees who were retained did not. She cites Barnes v. Mendenhall (1932), 98 Ind. App. 229, 183 N.E.556, and Watson v. Burnett (1939), 216 Ind. 216, 23 N.E.2d 420, in support of her position. In Barnes the school board cancelled a permanent teacher's contract pursuant to Chapter 97 of the Acts of 1927, page 259, commonly known as the "Teachers Tenure Act". Although there have been a few changes in the wording, and the section has since been recodified, the substance is the same as IC 20-6.1-4-9 and IC 20-6.1-4-10 under which Stewart's contract was cancelled. Chapter 97 provided that a teacher who had served under five successive contracts and who then entered into a contract for further service, thereby became a permanent teacher serving under an indefinite contract. Section two

of the act provided that an indefinite contract could be cancelled for certain causes including a "justifiable decrease in the number of teaching positions . . .". Grace Barnes, like Stewart, was a permanent teacher serving under an indefinite contract. The school board cancelled her contact because of a "justifiable decrease in the number of teaching positions." Barnes at 98 Ind. App. 232. Barnes appealed the decision of the school board because other non-permanent teachers who did not have indefinite contract were filling positions which Barnes was licensed to fill. The court concluded that a permanent teacher's license could not be cancelled as long as there were non-permanent teachers holding positions which the permanent teacher was licensed to fill.

The trial court concluded as a matter

of law that Barnes did not apply to Stewart's situation because Stewart "was less qualified for the psychometrist/counsel [sic] position than anyone else retained in the position." R. 23. However, since we have determined that the two non-permanent employees did not have the proper certification for the position, we cannot agree that Barnes does not apply.

FWCS contends that Barnes does not apply because Stewart is not a classroom school teacher. Appellee's Brief 33. As we have already noted, FWCS has stipulated that Stewart was a tenured teacher and that her contract was cancelled pursuant to the provisions of IC 20-6.1-4-10. That section applies to permanent teachers with indefinite contracts. Although the current law does not use the term "tenure", that term applies to permanent

teachers serving under indefinite contracts. IC 20-6.1-1-8 (Burns Code Ed., 1985 Replc.), defines the term "teacher" as:

> a professional person whose position in the school corporation requires certain teacher training preparations and licensing. The term includes, but is not limited to, any Superintendent, supervisor, principal, attendance officer, teacher, or librarian.

According to IC 20-6.1-1-4 (Burns Code Ed., 1982 Supp.):[8]

> the term "license" refers to any document issued by the commission on teacher training and licensing, which grants permission to serve as a particular kind of teacher. the term includes, but is not necessarily limited to, any certificate or permit, issued by the commission on teacher training and licensing.

Stewart had a school psychometrist's license which she professionalized by meeting the licensing requirements of the Commission on Teacher Training and licensing for School Psychologist I. R. 162, 227; 530 IAC 2-1-11.[9] Stewart is a teacher according to the statutory

definition; therefore Barnes applies.

Applying the rule in Barnes to Stewart's situation we conclude that since the two non-tenured employees were not properly licensed, Stewart's contract should not have been cancelled.

III.

Section 1983

Stewart contends that she was denied substantive due process by the arbitrary and capricious conduct of the school board. She seeks redress under 42 U.S.C. section 1983,[10] and attorney's fees under section 1988.

Stewart contends that she has been deprived of a property right protected by the due process clause of the Fourteenth Amendment to the United States Constitution. The United States Court of Appeals for the Seventh Circuit, addressing a claim by a non-tenured

teacher that her substantive due process rights had been denied when she was terminated, stated:

> The claim that a person is entitled to "substantive due process" means . . . that state action which deprives him of life, liberty, or property must have a rational basis -- that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as "arbitrary".

Jeffries v. Turkey Run Consolidated School District (7th Circ. 1974), 492 F.2d 1, 3-4. In order for Stewart to prevail on a substantive due process claim she must show that the cancellation of her contract by FWCS constituted arbitrary action which deprived her of an interest in liberty or property to which she was entitled.

In Jeffries, the plaintiff did not prevail because the court determined that she had no liberty or property interest at stake. Stewart, however, did have a property interest to which she was

entitled by IC 20-6.1-4-9, which gave her "permanent" status, and IC 20-6.1-4-10, which set out limited grounds for the cancelation of her contract. We have already characterized the cancellation of Stewart's contract as unlawful; we must now determine if the board action constituted an arbitrary deprivation of property which entitles Stewart to Fourteenth Amendment due process protection.

In Riggin v. Board of Trustees of Ball State University (1986), Ind.App., 489 N.E.2d 616, 627, trans. denied, this court state that:

> in order to satisfy substantive due process, an administrative decision must be in accord with previously stated ascertainable standards. The requirement is to make certain that administrative decisions are fair, orderly, and consistent rather than irrational and arbitrary. The standard should be written with sufficient precision to give fair warning as to what the agency will consider in making its decision, and it

should be made readily available to those having potential contact with the administrative agency.

(Internal quotation marks omitted; citations omitted.) The ascertainable standards in this case consisted of the state licensing requirements and the FWCS policy approved at the January 1983 board meeting. If the board had followed these standards its decision would have been "fair, orderly, and consistent". However, the board followed rescinded procedure that was inconsistent with statutory licensing requirements. The board decision to cancel Stewart's contract was not made in accord with "previously stated ascertainable standards", therefore, we conclude that the board action was irrational and arbitrary. FWCS has deprived Stewart of a property interest secured by the due process clause of the Fourteenth Amendment. This deprivation

entitles her to damages and equitable relief pursuant to Section 1983, and to attorney fees under Section 1988.

We reverse the judgment of the trial court and remand to the trial court for proceedings consistent with this opinion.

CHEZEM, J., CONCURS.

HOFFMAN, J., DISSENTS WITH SEPARATE OPINION.

DISSENTING OPINION

HOFFMAN, J.

I respectfully dissent from those portions of the majority opinion describing the school board's action as arbitrary and capricious. The majority perceives that Stewart's contract was cancelled pursuant to the rescinded administrative reduction policy, but a thorough examination of the findings of the board of school trustees discloses reliance upon the revised guidelines

approved and authorized on January 24, 1983.

The revised guidelines for administrative reductions provided in pertinent part:

"1. Administrators are not subject to lay off/recall in the same manner as are teachers, and therefore, if there are more administrative personnel under contract than there are available positions, the excess administrators will either be reassigned or be subject to termination.

Administrators will be selected for reduction in force in a manner that is fair and equitable after the qualifications of the individuals potentially involved have been reviewed.
involved have been reviewed.
2. Re-assignments of some administrators to different units and/or different positions as a result of the reduction in number of administrative positions may be necessary.

Displaced administrators may be placed in teaching positions according to their seniority in the appropriate certification group.

3. If there are displace administrators who are not qualified for any available position, the Board will be asked to cancel the contract of those administrators.

The Superintendent's recommendation for cancellation of contracts will be made to the Board of School Trustees at the second meeting in March.

If there are administrators whose contracts are to be cancelled, the procedures followed will be those outlined in the applicable state statutes. (IC 20-6.1-4 et seq.)"

The school board's findings indicate that administrative employees who worked as psychometrists were re-assigned to different positions as a result of the elimination of the position of psychometrist.

"19. . . . All other administrative employees who formerly worked as psychometrists are employed as psychometrist/counselors if they had a counseling license, or as acting psychometrist/counselors if they had only a teacher's license while they work toward a counseling certificate in accordance with the program approved by the School board on November 23, 1981 (Board Exhibit 7).

* * * * *

22. There is a justifiable need to decrease the number of administrative positions and to eliminate the position of psychometrist.

23. Neither North Central nor the Department of Public Instruction require [sic] any particular staffing levels for psychometrists. Although Rule 5-1 (Exhibit G) issued by the Commission on General Education of the Indiana State Board of Education requires testing of special education students, no permanent employment of full-time psychometrists is mandated. Therefore, the job of psychometrist may be eliminated without violating any rule or regulation of this State or any accreditation requirements of North Central."

Stewart, a displaced administrator under the revised guidelines, was not qualified for the position of psychometrist/counselor or acting psychometrist/counselor.

"20. Although Kathy Stewart has, since her layoff in March of 1982, been working towards a teacher's license, one of the prerequisites to a counseling license (see Exhibit A), she still has over 30 hours of studies to compete to obtain a teacher's certificate. She is the least senior in terms of service with the Fort Wayne Community Schools under regular contract of all psychometrists holding only a single certification (Board Exhibits 10 and 11)."

Because Stewart could not be re-assigned,

her contact was subject to termination.

"25. There are currently no job openings for psychometrist/counselors. Kathy Stewart has the least service under regular contract of all certified psychometrists who have no other certification. There is no other administrative position which she is qualified or certified to perform."

The findings of the school board with respect to the cancellation of Stewart's contract reflected due consideration of and compliance with the revised guidelines for administrative reductions.[1]

I cannot agree that the school board failed to follow its own guidelines, thereby rendering its action arbitrary and capricious. Accordingly, I must dissent from the majority's conclusion that Stewart is entitled to damages and equitable relief under 42 U.S.C. § 1983.

I further dissent from the majority's conclusion that Stewart, as a tenured teacher, could not be discharged while

nontenured employees were retained as acting psychometrist/counselors. The majority bases its decision upon Barnes v. Mendenhall (1932), 98 Ind. App. 229, 183 N.E. 556. In Barnes, this Court rejected that proposition that a school board, justifiably seeking to reduce the number of teaching positions, has the discretion to choose between tenured and non-tenured teachers, both of whom are licensed to fill the position which remains. Id. at 241-242, 183 N.E. at 560.

The reasoning from Barnes is inapplicable to the facts of the case at bar. The school board in the instant case found that Stewart was not qualified for a re-assignment to the position of acting psychometrist/counselor. The position was available to psychometrists who had teacher's licenses, and Stewart had yet to obtain such license. Because the board

did not impermissibly choose between equally qualified tenured and non-tenured teachers, Barnes is inapposite.

For the foregoing reasons, I dissent.

ENDNOTES

[1] Stewart earned the status of "tenure" pursuant to IC 20-6.1-4-9 (Burns Code Ed., 1985 Replc.). This section provides that:

(a) Each person who:
(1) Serves under contract as a teacher in a public school corporation for five [5] or more successive years; and
(2) at any time enters into a teacher's contract for further service with that school corporation;
becomes by that a permanent teacher of that school corporation. When a contract between the school corporation and a permanent teacher expires by its terms, that contract is considered to continue indefinitely as an indefinite contract.
(b) An indefinite contract remains in force until the permanent teacher reaches seventy-one [71] years of age, unless it is:
(1) Replaced by a new contract signed by both parties; or
(2) Cancelled as provided in sections 10 and 11 [20-6.1-4-10 and 20-6.1-4-11] of this chapter.

For purposes of this opinion we will use the terms "tenure" and "permanent" interchangeably.

[2] Section 10 provides a pertinent part that:

(a) An indefinite contract with a permanent teacher may be cancelled in the manner specified n section 11 [20-6.1-4-11] of this chapter for only the following grounds:
(1) Immorality;
(2) Insubordination, which means a willful refusal to obey the state school laws or reasonable rules prescribed for the government of the school corporation;
(3) Neglect of duty;
(4) Incompetency;
(5) Justifiable decrease in the number of teaching positions; or
(6) Other good and just cause.

[3] Stewart was originally laid off on March 22, 1982, pursuant to this dual certification policy. However, upon the recommendation of FWCS attorneys, Stewart was re-employed for the 1982-83 school year because proper contract cancellation procedures had not been followed. When the board gave her a contract for the 1982-83 school year she achieved the status of a "permanent" teacher because she had already served under five successive contracts as required by IC 20-6.1-4-9.

[4] This section was repealed in 1984. Requirements for counselor are currently found at 511 IAC 10-1-65.

[5] Transferred to 511 IAC 4-1; counselors, psychometrists, and psychologists I and II all fall under

Pupil Personnel services.

[6] There is evidence in the record that at east one of these employees performed only the testing duties of pscyhometrist although he carried the dual title.

[7] Although some of these sections have been amended, and some added, since the school board cancelled Stewart's contract in 1983, the point we make is that the State Board of Education, not the school board, had the exclusive authority to determine licensing requirements at that time.

[8] This section was amended in 1984 to change "commission on teacher training and licensing" to "state board of education". IC 20-6.1-1-4 (Burns Code Ed., 1985 Replc.)

[9] This section was transferred from the Commission on Teacher Training and Licensing to the State Board of Education in 1984; these requirements are now found at 511 IAC 10-1-68.

[10] Section 1983, entitled "Civil action for deprivation of rights" states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United State . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

ENDNOTES (DISSENT)

[1] The school board's discussion of the rescinded policy merely supplied the context for the board's initial decision to lay off Stewart.

IN THE SUPREME COURT OF INDIANA
APPEAL FROM THE WHITLEY CIRCUIT COURT

SHEPARD, Chief Justice.

This case presents the question whether there are circumstances in which a tenured teacher in Indiana may be discharged due to a reduction in force when a non-tenured teacher is retained in a position for which neither one is fully qualified under state law. We hold that the answer is yes. Kathleen Stewart was hired by Fort Wayne Community Schools as a psychometrist in 1978. During her years with the school system, the student population continually declined, the property tax was frozen, and federal funds were constricted. Under these combined pressures, the school

system was forced to reduce its teaching and administrative staff, including its staff of psychometrists.

In May 1981, Dr. William Anthis, the superintendent of the school system, met with the psychometrists, including Stewart, to notify them of the impending reductions in force. Dr. Anthis advised them that as the administrative staff was reduced, those remaining would need to be able to wear a variety of professional hats. He indicated that an employee who held multiple certifications from the state would have a better change of being retained than an employee who held only one certificate. Stewart held only one certificate, but she began to take classes toward her classroom teaching certificate. In the fall of 1981 and the summer of 1982, she took a total of twenty-four hours of classes toward her

classroom teaching certificate, but she stopped more than thirty hours short. Preparing for reductions in personnel, in November 1981 the school board decided to combine the previously separate positions of psychometrist and guidance counselor. Under state law, guidance counselors were required to have both a classroom teaching certificate and a guidance counselor certificate. The school board acknowledged in its 1981 employment policy that "[i]n some situations it may be necessary to give a . . . Psychometrist a period of time to fully meet the certification requirements of the position to which he/she is assigned." Those who were to be retained but who were still working toward a required certification would hold the title of "acting psychometrist/counselor." Stewart was not certified as a classroom teacher or as a

counselor.

During November 1981, a committee interviewed all psychometrists and counselors to determine who should remain in the reduced number of combined psychometrist/counselor positions. The committee considered four factors: the number of certificates held by the applicant, the applicant's interest, seniority, and other qualifications. Stewart, of course, held only one certificate. In addition, the committee members felt that Stewart had not exhibited much interest in pursuing her counselor certificate. They noted, for example, that she had responded ambivalently to a questionnaire regarding her preferred future assignments.

On March 22, 1982, Stewart was notified that she would be laid off at the end of the school year along with six other

employees. Of those being retained in the acting psychometrist/counselor position, two were non-tenured psychometrists who held both psychometrist and teaching certificates but did not hold counselor certificates. Stewart complained to Superintendent Anthis in writing:

> In my interview with the committee, I was asked for an instantaneous commitment [sic] of intent to seek additional certification in counseling. Since such a commitment [sic] would mean a definite change in lifestyle and career goals, this kind of instantaneous ultimatum seems an unfair labor practice. Indeed, to even call this an interview when one is already employed seems facetious and an intent to escape fair labor practice.

Record at 137.

Because the board had failed to notify Stewart that a state statute afforded her the right to a pre-termination hearing,[11] it decided to reinstate her for the 1982-83 school year as a psychometrist. Apparently by virtue of this rehire, Stewart obtained tenure. It is her status

as a tenured teacher that now serves as the legal predicate for this lawsuit.

During the next school year, deputy school superintendent Dr. James Robbins notified Stewart by letter that the continuing decline in student enrollment necessitated further cutbacks in administrative personnel. Dr. Robbins' letter noted that the school system needed employees with dual certifications, that Stewart had only a psychometrist certificate, and that Stewart had less seniority than any other psychometrist with a single certificate. Dr. Robbins concluded his letter to Stewart by stating that the superintendent was recommending to the school board that her contract be cancelled at the end of the school year. His letter also informed her that she could contest the superintendent's recommendation by requesting a hearing with the school

board.

Stewart did request a hearing, and one was held on March 14, 1983. At this hearing, the superintendent presented the reasons for his recommendation, and Stewart was given an opportunity to respond and present evidence. On March 28, 1983, the school board released its findings and conclusions. It decided that Stewart's contract should be cancelled, effective June 17, 1983.

Stewart sued the school system in the Whitley Circuit Court. Although Stewart's original complaint was not made a part of the record on appeal, it appears she claimed a right to reinstatement and back pay based on violations of Indiana's teacher tenure law, Ind. Code § 20-6.1-4-10 (West 1984), and 42 U.S.C. § 1983 (1988). Following a bench trial, the trial court found for the school system.

Stewart appealed, and the Court of Appeals reversed on both counts. Stewart v. Fort Wayne Community Schools (1989), Ind. App., 545 N.E.2d 7.

Because this Court has not addressed directly the legal issues presented by the discharge of tenured teachers in Indiana since State ex rel. Thurston v. School City of Anderson (1957), 236 Ind. 649, 142 N.E.2d 914, we grant transfer. We affirm the trial court's decision in favor of the school system.

This case presents two issues:

I. Whether the school system's decision to discharge Stewart and retain non-tenured personnel violated Stewart's rights under state law.

II. Whether the school system's decision to discharge Stewart constituted an arbitrary and capricious deprivation of a protected property interest in violation of her federal constitutional right to substantive due process and, thus, in violation of her rights under 42 U.S.C. § 1983.

I. Stewart's State Law Claims

Stewart's claims under state law essentially fall into two categories. First, she alleges the school system violated the teacher tenure law, as that law was interpreted in Watson v. Burnett (1939), 216 Ind. 216, 23 N.E.2d 420. Second, she alleges that the school board's decision was arbitrary and capricious and not based on the evidence before it.

The teaching profession in this state has long enjoyed statutory protection. Since the enactment of the teacher tenure law in 1927, now codified at Ind. Code § § 20-6.1-4-1 to -20 (West 1984 & Supp. 1990), the Indiana legislature has provided experienced teachers with a legal shield that protects them from unjustified dismissals. Under this law, teachers attain tenure status after their fifth

year of teaching. Ind. Code § 20-6.1-4-10(a)(5). The law also prescribes procedures which must be followed before a tenured teacher can be discharged. Ind. Code § 20-6.1-4-11. Stewart does not claim that any procedural requirements were ignored by the board, but she does contend that the board's decision to discharge her as part of a reduction in force was illegal under the teacher tenure law and was not supported by the evidence.

Although the teacher tenure law erects many safeguards for tenured teachers, the law does not prescribe that standard by which courts are to review a school board's decision to discharge tenured personnel. While errors of law are readily discerned and resolved by courts, this statutory silence has generated much confusion about the appropriate analysis

applicable to evidentiary error by boards. For example, both petitioner and respondent have assumed that the standard was enunciated in Metropolitan School District of Martinsville v. Mason (1983), Ind. App., 451 N.E.2d 349. In that case, the Court of Appeals considered whether a school board's decision to withhold a school bus contract from the sole bidder on grounds the bid was too high was either "arbitrary, capricious" or "unsupported by substantial evidence." Id. at 353. This two-pronged inquiry into the factual support for the decision was gleaned from Indiana's Administrative Adjudication Act. Ind. Code § 4-21.5-5-14(d) (West Suppl 1990) (previously codified at Ind. Code § 4-22-1-18).[12] The Administrative Adjudication Act, however, does not control local school board decision-making. See, e.g., Ind. Code §

4-21.5-1-3 (West Supp. 1990) (act does not apply to agency of a political subdivision of the state); and Tippecanoe Valley School corp. v. Leachman (1970), 147 Ind. App. 443, 261 N.E.2d 880 (local school board exempt from the act's requirements because it is not a state-wide agency). All in all, there seems to be little reason to ask both whether a school board's decision is "arbitrary and capricious" and whether it is "unsupported by substantial evidence." Whatever differences exist between the two tests create more confusion than they are worth.[13]

Instead, we hold that the "substantial evidence" standard should be applied when reviewing the evidentiary support behind a school board's decision. This standard is, perhaps, the oldest standard of review of administrative agency decisions and is

today the most commonly utilized one. See 5 K. Davis, Administrative Law Teatise § 29:5 at 350-51 (2d ed. 1984) (substantial evidence" test first applied to administrative agency decisions by the U.S. Supreme Court in 1913 and subsequently adopted by Congress as the standard of review under the National Labor Relations Act and the Fair Labor Standards Act). The "substantial evidence" test was set out by this Court in the related cases of Stiver v. State ex rel. Kent (1936), 211 Ind. 370, 1 N.E.2d 592, and Stiver v. State ex rel. Kent (1936), 211 Ind. 380, 1 N.E.2d 1006. In the second Stiver opinion, we capsulized the standard as follows: "If the procedural requirements are followed, including the assignment of a legal cause for cancellation [of the contract], and if there is substantial evidence presented

which tends to support the legal cause, and if the hearing is, in fact, fair, the proceeding is lawful." 1 N.E.2d at 1007. Under the substantial evidence standard, the reviewing court must consider the record as a whole, not just the evidence that is favorable to the school board's decision. A court may vacate a school board's decision only if the evidence, when viewed as a while, demonstrates that the conclusions reached by the school board are clearly erroneous. With this standard of review established, we turn to Stewart's state law claims: first, that the board's decision violated the tenure act, and second, that the board's decision was not supported by the evidence.

A. Stewart's Teacher Tenure Rights

Arguing that the school board's actions were contrary to the teacher tenure law, Stewart relies on Watson v. Burnett

(1939), 216 Ind. 216, 23 N.E.2d 420. That case presented an early opportunity to explore the reach of the teacher tenure law's protections. Julia Burnett was a tenured teacher licensed to teach only in grades one through four. She was fired as the result of a reduction in force. Although the law permitted a school to discharge a tenured teacher in that situation, Burnett complained that non-tenured teachers had been retained to teach classes she was also certified to teach. She argued that if the law's purposes were to be fully realized, tenured teachers had to be given priority over equally qualified non-tenured teachers during reductions in force. This Court agreed, and ordered the school board to reinstate her.

Relying on the teacher tenure law and the Watson decision, Stewart argues that

because both she and the two non-tenured teachers lacked a counselor's certificate (one of the two certificates required by state law for the guidance counselor position), she was as "qualified" as they were to hold the title "acting psychometrist/counselor." As the only tenured teacher among these three "equals," Stewart claims the teacher tenure law requires her to have been retained. Her argument is unpersuasive. Indiana Code § 20-6.1-4-10 and our decision in Watson protect Stewart from being fired before non-tenured teachers due to a reduction in force only as long as her qualifications make her eligible for the job she seeks. Watson emphasized that a tenured teacher must still be "qualified to teach in the position for which the non-tenured teacher is retained." 216 Ind. at 221, 23 N.E.2d at

423. This prerequisite is reinforced by regulations of the Indiana Department of Education, which require that school personnel, including guidance counselors, be properly certified in their field. Ind. Admin. Code tit. 511, r. 4-1-3 (1988). Stewart's own brief to the Court of Appeals concedes that she was unqualified under state law to work as a counselor. Brief at 23-24.

Our decision in Watson bestowed a powerful sword on tenured teacher, and Stewart naturally seeks to use it in her favor. That sword, however, was designed to enforce the teacher tenure law. It cuts only in favor of the primary legislative intent behind that act--the promotion of the public good through the creation of a competent cadre of teachers in the state. The law is primarily intended to "promote . . . the welfare of the state and of the

school system by preventing the removal of capable and experienced teachers at the political or personal whim of changing officeholders." State ex rel. Anderson v. Brand (1937), 214 Ind. 347, 351, 5 N.E.2d 531, 532, rev'd on other grounds sub mon. Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938); see also School City of Lafayette v. Highley (1938), 213 Ind. 369, 376-77, 12 N.E.2d 927, 930 (purpose of the act is to protect the educational interest of the state, not to grant special privileges to any class of teachers); accord Note, Dismissal or Removal of Public School Teachers Under Teacher' Tenure Laws, 21 Notre Dame L. Rev. 25, 26-27 (1945). The sword may not be used by a teacher to litigate her way into a position that she is unqualified to hold under state law. Cf. Switzerland County School Corp. v. Sartori (1982), Ind. App.,

442 N.E.2d 702 (rejecting teacher's suit seeking enforcement of contract with school system on grounds that contract was void because teacher lacked certificate to teach in Indiana). Stewart does not qualify for relief under the rule of Watson v. Burnett, which rule requires the tenured teacher to be as well qualified as the non-tenured teacher who was retained. The trial court correctly held that Ind. Code § 20-6.1-4-10 had not been violated by the school system.

B. Stewart's "Substantial Evidence" Argument

Stewart's second state law claim is that the school board's decision is not supported by the evidence before it. After reviewing the record, we hold that the board's decision in this case was not clearly erroneous.

Facing a declining student population and

dwindling financial resources, the school system was forced to reduce its teaching and administrative staff. These reductions were complicated by a variety of pressures. First, many of the teachers, like Stewart, had tenure rights that had to be accommodated. Second, the State of Indiana prescribed minimum educational standards that further limited the board's flexibility. Third, the private accreditation system prescribed additional minimum standards that had to be met if the school system was to retain its accreditation. The board decided that it could reduce its staff and still satisfy these pressures by combining the positions of psychometrist and guidance counselor. In combining these positions, however, the school board was forced to choose between Stewart and two non-tenured psychometrists. Both of the non-tenured

employees already had classroom teaching certificates that enabled them to teach a class or two should the need arise. Stewart was not certified to teach in the classroom. Had she been retained, the board would have had to look elsewhere for a certified classroom teacher. Moreover, both of the non-tenured psychometrists were closer to being certified as guidance counselors, and they exhibited greater willingness to pursue the certification. Considering these factors along with the rest of the record, the school board's decision to retain the non-tenured psychometrists over Stewart was quite a reasonable choice. The board's decision survives the substantial evidence test.

II. Stewart's § 1983 Claim

Section 1983 of Title 42[14] was originally enacted as § 1 of the "Ku Klux Klan Act of 1871." That act was the federal

government's reaction to an alarming increase in racist violence in the South during Reconstruction. Although originally intended as a means of gaining federal control over state officials who failed to stop acts of violence against blacks and Northern sympathizers (particularly acts committed by the Klan), § 1983 has today developed into the primary civil means to remedy violations of the federal Constitution. 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure § 19.13, at 762 (1986). State courts may exercise concurrent jurisdiction over § 1983 claims. Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980).

To make out a § 1983 claim, a plaintiff must establish that a deprivation of rights, privileges, or immunities secured by the United States Constitution or

federal law resulted from conduct occurring under the color of state law. Here, Stewart claims that the school board's decision to fire her constituted conduct under color of state law that violated her constitutional right to substantive due process. The only question that has been raised on appeal is whether the school board's action deprived her of such a federal constitutional right. We hold that it did not.

Substantive due process prohibits state action which deprives one of life, liberty or property without a rational basis for the deprivation. Where the basis for such state action is so lacking as to make it "arbitrary and capricious," courts will invalidate the action as violating substantive due process. Stewart claims that the school board's decision to fire her was arbitrary and capricious, and

deprived her of a property interest in her job.

Although due process is a constitutional right, its application to this case hinges on whether our state law grants Stewart a protectable property interest in her job. The United States Supreme Court has said:

> To have a property interest in a benefit [such as a job] a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

In Speckman v. City of Indianapolis (1989), Ind., 540 N.E.2d 1189, this Court discussed the extent of a public employee's property interest in his job within the context of procedural due process. We held that a city park director would have a protectable property interest in his job if he could show an entitlement to continued employment.

Entitlement to a public job can arise from contract or state law. City of Mishawaka v. Stewart (1974), 261 Ind. 670, 310 N.E.2d 65.

In this case, Stewart does not have a contractual claim to continued employment beyond the 1982-83 school year. Her last contract with the school system was for only one year, and expired on June 17, 1983. However, we believe that her statutory status as a tenured teacher does vest in her a property interest in her job that entitles her to the protections afforded by substantive due process. We have previously held that similar tenure statutes vested other public employees with protected property interests in their jobs. See State ex rel. Felthoff v. Richards (1932), 203 Ind. 637, 180 N.E. 596 (tenure statute confers on policeman a protectable interest in his job), and City

of Mishawaka v. Stewart, 261 Ind. at 676, 310 N.E.2d at 68 (applying Felthoff to firemen). Both of these cases noted that tenure statutes were intended to encourage the creation of an apolitical, merit-based work force in vital areas of government service. Because the teacher tenure act was passed with this same purpose in mind, it ought to confer on a teacher an equally secure property interest.

Because Stewart has a property interest in her job, the United States Constitution protects her from being deprived of her job for arbitrary and capricious reasons. She claims that the school board's decision was arbitrary and capricious for two reasons--it violated Indiana's teacher tenure law and the school board's own employment policies. We have already rejected the first possibility. See supra part I(B). As explained below, we also

reject the second.

Stewart argues that the school board's decision violated its January 1983 employment policy in two ways. First, Stewart claims that the school board improperly applied the dual certification requirement contained in the old 1981 employment policy when it decided to terminate her. She argues this was improper because the dual certification requirement was officially rescinded by the 1983 policy. This argument is without merit. Stewart's attorney did not argue at the school board hearing March 1983 that the dual certification requirement had been rescinded by the 1983 policy, nor did he try to enter the 1983 policy into evidence at the school board hearing. Although the 1983 policy did rescind the formal 1981 policy statement, it is clear that the board's interest in having

personnel with dual certifications survived. The 1983 policy, itself, did not expressly rescind the dual certification requirement. On the contrary, the dual certification requirement took on a life of its own, outside of the confines of the formal 1981 policy statement. The formal 1981 policy was not the only way Stewart had heard about the importance of having dual certifications. Dr. Anthis also informed the psychometrists in 1981 that the school system was beginning a belt-tightening period, and that employees with dual certifications had the best chance of being retained. Moreover, Stewart has never argued that she stopped working on her classroom teaching certificate because of her belief that the dual certification requirement had been rescinded by the 1983 policy. Indeed, Stewart stopped working

on her second certificate after the summer 1982--six months before the 1983 policy was even announced.

Second, Stewart argues that the school board ignored its 1983 policy by failing to cite the policy in its findings. We do not believe that the 1983 policy was ignored by the school board. The 1983 policy enunciated only a very general standard which left the board with a large degree of discretion. It stated only that the reductions in administrative staff would occur in a "manner that is fair and equitable after the qualifications of the individuals potentially involved have been reviewed." Record at 270. Although not reproduced verbatim in the board's findings, this standard was fully met. Stewart was permitted to present her qualifications to the board during her hearing. In light of all the evidence

presented to the board, including the evidence that was adverse to Stewart's case, the board's decision was "fair and equitable," and thus in full compliance with its 1983 employment policy.

Because the school board's decision to terminate Stewart did not violate either state law or its own employment policy, it was not arbitrary and capricious. Without an arbitrary and capricious government decision to support her substantive due process claim, Stewart's derivative § 1983 claim fails. The trial court was correct in finding for the school system on this claim.

The trial court is affirmed.

FOOTNOTES

[1] Ind. Code § 20-6.1-4-11 (West 1984).

[2] Although Mason did not directly cite to the Administrative Adjudication Act, it did cit to other adminstrative law cases that involved the act. 451 N.E.2d

at 353 (citing to Natural Resources Commission v. Sullivan, 428 N.E.2d 92, 97 (Ind. App. 1981) (stating the act's standard of judicial review of administrative decisions)).

[3] The leading scholar on administrative law, Professor Kenneth Culp Davis, has stated that no other area of administrative law is in more need of general reform than the common law of the state courts concerning standards of judicial review. K. Davis, Administrative Law Text § 24.01 at 458 (West 3d ed. 1972). Davis noted in his most recent treatise on the subject that the best way to reform this area of the law would be to simply the standards. "Everyone . . . should learn from the experience of the past quarter of a century that refining the verbalisms about scope of review is not merely unprofitable but harmful." 5 K. Davis, Administrative Law Treatise § 29:7 at 363 (2d ed. 1984).

[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1983 (1988).

KATHLEEN ANN STEWART -VS- FORT WAYNE COMMUNITY SCHOOLS

You are hereby notified that the Supreme Court has on this day 3/21/91 Appellant's Petition for Rehearing is hereby denied without opinion. Randall T. Shepard, Chief Justice.

All justices Concur.

Appellant's Petition for oral argument is hereby denied. Randall T. Shepard, Chief Justice.

All justices concur.

WITNESS my name and the seal of said Court, this 21st day of March, 1991.

_____

Clerk Supreme Court, Court of Appeals and Tax Court

Supreme Court, U.S.
FILED
JUL 15 1991
OFFICE OF THE CLERK

No. (3) 91-16

IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, 1991

KATHLEEN ANN STEWART,

Petitioner,

vs.

FORT WAYNE COMMUNITY SCHOOLS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Fort Wayne Community Schools to discharge Kathleen Ann Stewart constituted an arbitrary and capricious deprivation of a protected property interest in violation of her federal constitutional right to substantive due process and, thus, in violation of her rights under 42 U.S.C. §1983.

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OPINIONS BELOW

On November 4, 1988, the Whitley Circuit Court (Whitley County, Indiana), entered judgment in favor of Respondent, Fort Wayne Community Schools ("FWCS"), affirming the School Board's decision to cancel Petitioner's, Kathleen Ann Stewart's

("Stewart"), contract with the school district.

In a published opinion issued October 16, 1989, the Court of Appeals for the Third District of Indiana reversed judgment for FWCS and remanded to the Trial Court for proceedings consistent with its opinion that FWCS wrongfully terminated Stewart.

On December 27, 1990, the Supreme Court of Indiana, by a published opinion, reversed the Appellate Court's ruling and affirmed the Trial Court's decision declaring the School Board's decision to cancel Stewart's contract with the School Board lawful.

On March 21, 1991, the Supreme Court denied Stewart's Petition For Rehearing Without Opinion.

All Court entries listed above are contained in Petitioner's Appendix for Writ of Certiorari.

JURISDICTION

Stewart's Petition for Writ of Certiorari arises from the denial of Petitioner's Request For Rehearing by the Supreme Court of Indiana on March 21, 1991.

Jurisdiction of this Court is invoked by Stewart under 28 U.S.C. §1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions relevant to Stewart's petition for Writ of Certiorari are contained in Stewart's Petition.

STATEMENT OF THE CASE

Stewart brought an action against FWCS when FWCS cancelled her contract with the school district.

On November 4, 1988, the Whitley Circuit Court, by The Honorable Edward J. Meyers, entered judgment in favor of FWCS

declaring all statutory procedures regarding the cancellation of Stewart's contract were followed by FWCS. In addition, the Trial Court found no evidence was submitted nor advanced by Stewart to support a claim based on a violation of substantive due process.

The Court of Appeals for the Third District of Indiana reversed judgment in favor of FWCS and found the School Board's action in cancelling Stewart's contract was arbitrary and capricious by following a rescinded policy. Because FWCS followed a rescinded policy in cancelling Stewart's contract, the Court found the actions of FWCS were arbitrary and capricious depriving Stewart of a protected property interest in violation of her federal constitutional right to substantive due process and, thus, in violation of her rights under 42 U.S.C. §1983.

The Supreme Court of Indiana disagreed with the Court of Appeals and ruled in favor of FWCS declaring the decision of the School Board to discharge Stewart was not arbitrary and capricious giving rise to a §1983 action. The Court found the new 1983 policy did not expressly rescind the dual certification requirement of the prior 1981 policy. In addition, even if it could be argued the new policy did rescind the old, the Court found the 1983 policy was not ignored by the School Board in deciding to cancel Stewart's contract. The 1983 policy enunciated only a very general standard which left the Board with a large degree of discretion. It stated only the reductions in administrative staff would occur in a "manner that is fair and equitable after the qualifications of the individuals potentially involved have been reviewed." (R. at 270). In light of all the evidence presented to the Board by Stewart,

including the evidence that was adverse to her case, the Board decision was fair and equitable, and thus in full compliance with its 1983 employment policy.

Relevant Facts

Stewart was hired by FWCS as a psychometrist in 1978. During her years with the school system, the student population continually declined, the property tax was frozen and federal funds were constricted. Under these combined pressures, the school system was forced to reduce its teaching and administrative staff, including its staff of psychometrists. In May of 1981, Dr. William Anthis, the Superintendent of the school system, met with the psychometrists, including Stewart, to notify them of the impending reductions in force. Dr. Anthis advised them that as the administrative staff was reduced, those

remaining would need to be able to wear a variety of professional hats. He indicated that an employee who held multiple certifications from the State would have a better chance of being retained than an employee who held only one certificate. Stewart held only one certificate, but began taking classes towards a classroom teaching certificate. In the fall of 1981 and the summer of 1982, she took a total of 24 hours of classes toward a classroom teaching certificate, but stopped more than 30 hours short of achieving this license.

Preparing for reductions in personnel, in November of 1981 the School Board decided to combine the previously separate positions of psychometrists and guidance counselors. Under state law, guidance counselors were required to have both a classroom teaching certificate and a guidance counselor certificate. The School Board acknowledged in its 1981 Employment

Policy that in some situations it may be necessary to give a psychometrist a period of time to fully meet the certification requirements of the position to which he/she is assigned. Those who were to be retained but who were still working toward a required certification would hold the title of acting psychometrist/counselor. Stewart was not certified as a classroom teacher nor as a counselor.

During November of 1981, a committee interviewed all psychometrists and counselors to determine who should remain in the reduced number of combined psychometrist/counselor positions. The committee considered four factors: the number of certificates held by the applicant, the applicant's interest, seniority, and other qualifications. Stewart, of course, held only one certificate. In addition, the committee members felt Stewart had not exhibited much

interest in pursuing her counselor certificate. They noted, for example, that she had responded ambivalently to a questionnaire regarding her preferred future assignments. More specifically, Stewart turned in her preference sheet nine days after it was due and put a question mark in the box for psychometrist/counselor.

On March 22, 1982, Stewart was notified she would be laid off at the end of the school year along with six other employees. Of those being retained in the acting psychometrist/counselor position, two were non-tenured psychometrists who held both psychometrist and teaching certificates but did not hold counselor certificates. Stewart complained to Superintendent Anthis in writing:

> In my interview with the committee, I was asked for an instantaneous commitment [sic] of intent to seek additional certification in counseling. Since such a commitment [sic] would mean

> a definite change in lifestyle and career goals, this kind of instantaneous ultimatum seems an unfair labor practice. Indeed, to even call this an interview when one is already employed seems facetious and an attempt to escape fair labor practice.

(R. at 137).

Because the Board failed to notify Stewart that a state statute offered her the right to a pre-termination hearing, it decided to reinstate her for the 1982-83 school year as a psychometrist. By virtue of this re-hire, Stewart obtained tenure. It is her status as a tenure teacher that serves as the legal predicate for Stewart's lawsuit.

During the next school year, Deputy Superintendent Dr. James Robbins notified Stewart by letter that the continuing decline in student enrollment necessitated further cut-backs in administrative personnel. Dr. Robbins' letter noted the

school system needed employees with dual certifications, that Stewart had only a psychometrist certificate, and that Stewart had less seniority than any other psychometrist with a single certificate. Dr. Robbins concluded his letter to Stewart by stating the Superintendent was recommending to the School Board that her contract be cancelled at the end of the school year. His letter also informed her she could contest the Superintendent's recommendation by requesting a hearing with the School Board.

Stewart did request a hearing, and a hearing was held on March 14, 1983. At this hearing, the Superintendent presented the reasons for his recommendation and Stewart was given an opportunity to respond and present evidence. On March 28, 1983, the School Board released its findings and conclusions. It decided Stewart's contract should be cancelled, effective June 17,

1983. Thereafter, Stewart sued the school system in the Whitley Circuit Court.

REASONS FOR DENYING THE WRIT

Stewart was a tenured teacher pursuant to the Indiana Teacher Tenure Statute. As such, Stewart had a property interest in her job that is protected by the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972); Perry v. Sinderman, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972). Stewart does not submit her procedural due process rights under the Fourteenth Amendment were violated when she was terminated. Indeed, such a submission would fail. Stewart was notified the Superintendent of FWCS was recommending to the School Board her contract be cancelled and she could contest the Superintendent's recommendation by requesting a hearing with the School Board. After a hearing was

requested, the Superintendent presented the reasons for his recommendation and Stewart was given an opportunity to respond and present evidence. Instead, Stewart contends her substantive due process rights under the Fourteenth Amendment were violated when her contract was cancelled.

A claim that one is entitled to substantive due process means that state action which deprives him/her of life, liberty, or property must have a rational basis - that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary. Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1 (7th Cir. 1974). Applying this principal to the instant action, the doctrine of substantive due process provides the actions of the School Board in terminating Stewart's contract must not be "arbitrary and capricious." Korf v. Ball State

University, 726 F.2d 1222 (7th Cir. 1984). Stewart contends the action of the School Board in cancelling her contract was arbitrary and capricious because the Board relied on the 1981 Employment Policy rather than the 1983 policy. Thus, Stewart calls upon this Court to make a factual determination: Whether the School Board solely relied upon the 1981 policy in terminating her employment with FWCS.

This Court has previously declared that a Petition for Writ of Certiorari will not be granted where the case involves merely a review of findings of fact which would be of no importance save to the litigants themselves. Rudolph v. U.S., 370 U.S. 269, 8 L.Ed.2d 484, 82 S.Ct. 1277 (1962); Crumady v. "Joachim Hendrick Fissel", 358 U.S. 423, 3 L.Ed.2d 413, 79 S.Ct. 445 (1959); Southern Power Company v. Pub Service Company, 263 U.S. 508, 68 L.Ed. 413, 44 S.Ct. 164 (1924). Stewart's

Petition for Writ of Certiorari is such a case. The Trial Court and the Supreme Court of Indiana previously determined FWCS did not expressly rescind the dual certification requirement of the 1981 policy and did not ignore the 1983 policy in terminating Stewart. Unhappy with the result obtained in the Trial Court and the Indiana Supreme Court, Stewart seeks to take the U.S. Supreme Court on a journey back to Indiana to redetermine whether FWCS based its decision to terminate her contract solely on the 1981 policy. Such a journey would not include the consideration of an "important question of federal law . . ." as required by Supreme Court Rule 17.1(C), but rather a review of the facts of no more importance than to the litigants themselves. Hence, this case is a poor candidate for certiorari in view of the limited number of parties affected. Another determination of which policy FWCS

relied upon in terminating Stewart would not create rights or obligations of universal application. Even if this Court would review the facts of this case once again, it would find FWCS did not expressly rescind the dual certification requirement of the 1981 policy and did not ignore the 1983 policy in terminating Stewart.

Stewart claims the School Board improperly applied the dual certification requirement contained in the old 1981 employment policy when it decided to terminate her. She argues this was improper because the dual certification requirement was officially rescinded by the 1983 policy. This argument is without merit. Stewart's attorney did not argue at the School Board Hearing in March of 1983 the dual certification requirement had been rescinded by the 1983 policy, nor did he try to enter the 1983 policy into evidence at the School Board Hearing. Although the

1983 policy did rescind the formal 1981 policy statement, it is clear the Board's interest in having personnel with dual certification survived. The 1983 policy, itself, did not expressly rescind the dual certification requirement. On the contrary, the dual certification requirement took on life of its own, outside the confines of the formal 1981 policy statement. The formal 1981 policy was not the only way Stewart had heard about the importance of having dual certifications. Dr. Anthis informed the psychometrists in 1981 the school system was beginning a belt tightening period, and that employees with dual certifications had the best chance of being retained. Moreover, Stewart has never argued she stopped working on her classroom teaching certificate because of her belief the dual certification requirement had been rescinded by the 1983 policy. Instead,

Stewart stopped working on her second certificate after the summer of 1982, six months before the 1983 policy was even announced.

Stewart also argues the School Board ignored its 1983 policy by failing to cite the policy in its findings. The 1983 policy was not ignored by the School Board. The 1983 policy enunciated only a very general standard which left the Board with a large degree of discretion. It stated only that the reductions in administrative staff would occur in a "manner that is fair and equitable after the qualifications of the individuals potentially involved have been reviewed." (R. at 270). Although not reproduced verbatim in the Board's findings, this standard was fully met. Stewart was permitted to present her qualifications to the Board during her Hearing. In light of all the evidence presented to the Board,

including the evidence that was adverse to Stewart's case, the Board's decision was "fair and equitable," and thus in full compliance with its 1983 employment policy. Because the School Board's decision to terminate Stewart did not violate its own employment policy, it was not arbitrary and capricious. Without an arbitrary and capricious governmental decision to support her substantive due process claim, Stewart's §1983 claim fails.

CONCLUSION

For the reasons set forth above, it is respectfully submitted this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BARRETT & McNAGNY

By James P. Fenton

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